S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

JAMES BONFIGLIO, SUSAN BONFIGLIO, PBS INVESTMENTS, WOODSHOLLOW INVESTMENTS, LTD I, a Michigan Limited Partnership, and WOODCREEK CONDOMINIUM ASSOCIATION, a Non-Profit Corporation,

UNPUBLISHED
October 28, 2003

Plaintiffs-Appellants,

v

No. 222602
Eaton Circuit Court
LC No. 96-000287-CZ

PENNY G. PAMER,

Defendant-Appellee,

ON REMAND

and

FREDERICK P. PAMER and M & J REALTY INC,

Defendants.

JAMES BONFIGLIO, SUSAN BONFIGLIO, PBS INVESTMENTS, WOODSHOLLOW INVESTMENTS LTD I, a Michigan Limited Partnership, and WOODCREEK CONDOMINIUM ASSOCIATION, a Non-Profit Corporation,

Plaintiffs-Appellees/Cross-Appellants,

v

No. 223998
Eaton Circuit Court
LC No. 96-000287-CZ

PENNY G. PAMER,

Defendant-Appellant/Cross-Appellee,

and

FREDERICK P. PAMER and M & J REALTY INC,

Defendants.

Before: Owens, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiffs alleged that defendant Penny G. Pamer ("defendant") misappropriated plaintiffs' funds between 1983 and 1995. Plaintiffs did not file their lawsuit until February 1996. Following a jury trial, plaintiffs were awarded damages under several different theories and covering the entire period dating back to 1983. On appeal, we ruled in pertinent part that the trial court erred in not applying a three-year statute of limitation to plaintiffs' claims.[1] We remanded for a new trial limited solely to a determination of the damages occurring within the three-year period preceding plaintiffs' complaint. Our Supreme Court, in lieu of granting leave, remanded this case to us with instructions to consider "whether plaintiffs are entitled to the benefit of the fraudulent concealment statute, MCL 600.5855, including whether plaintiffs properly preserved this issue for appellate review."[2] Having considered these issues, we vacate our prior ruling that a three-year statute of limitation applied, and, therefore, remand for further proceedings consistent with both this opinion and our prior opinion.

The fraudulent concealment statute, MCL 600.5855, provides as follows:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

As noted above, plaintiffs alleged that defendant, by converting plaintiffs' funds for her own use between 1983 and 1995, committed various torts. Plaintiffs contended that they did not discover the harm until October 1995. Plaintiffs sued defendant on February 28, 1996—approximately five months after this purported discovery.

Among the issues litigated below were (i) whether plaintiffs' claims were barred by the applicable statute of limitation and (ii) whether plaintiffs could recover damages for the entire period from 1983 to 1995. The trial court allowed plaintiffs to recover damages for the entire period dating back to 1983. On appeal, we ruled that the trial court erred in not imposing a three-year statute of limitations. Pursuant to our Supreme Court's remand instructions, we must now determine whether MCL 600.5855 prevented the applicable statute of limitation from either precluding or limiting plaintiffs' recovery.

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[1] Unpublished opinion per curiam of the Court of Appeals, issued August 23, 2002 (Docket Nos. 222602 & 223998).

[2] Order of the Supreme Court, entered June 27, 2003 (Docket No. 122646).

As an initial matter, we note that plaintiffs properly preserved this issue for appellate review. Plaintiffs' January 21, 1998, response to defendant's motion for summary disposition argued that this case was "governed by what Michigan knows as the 'discovery rule' . . . ." Plaintiffs contended that summary disposition based on the expiration of any of the relevant statute of limitation was inappropriate because plaintiffs sued within two years of discovering the cause of action. Plaintiffs cited MCL 600.5855 in support of these arguments.

On January 28, 1998, the trial court rejected defendant's contention that, although plaintiffs' lawsuit was timely filed, plaintiffs' damages were limited to the period specified in the relevant statute of limitation. In rejecting this argument, the trial court specifically referenced MCL 600.5855. Accordingly, having been both raised and considered below, we conclude that plaintiffs properly preserved their claim that MCL 600.5855 prevented the otherwise appropriate statute of limitation from precluding or limiting their recovery.

Next, we must determine whether plaintiffs are entitled to the benefit of MCL 600.5855. In construing MCL 600.5855, we have opined as follows:

> Under MCL 600.5855 . . . the statute of limitation is tolled when a party conceals the fact that the plaintiff has a cause of action. The plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment. The plaintiff must prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery. [*Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996) (citations omitted).]

We emphasized that "[m]ere silence is insufficient." *Id.*

Here, plaintiffs' complaint alleged that defendant managed plaintiffs' financial affairs. The complaint noted that defendant's management tasks included paying plaintiffs' bills, depositing funds into bank accounts, and preparing accountings. The complaint alleged that defendant "created fictitious statements reporting income and expenses." Thus, plaintiffs' complaint alleged that defendant's conduct went beyond mere silence. Plaintiffs' complaint further alleged that plaintiffs reasonably relied on these fictitious statements, and, therefore, had no reasonable basis to suspect that defendant was diverting their funds for her own use. The complaint also alleged that plaintiffs did not become aware of defendant's actions until her husband, defendant Frederick P. Pamer, informed them of her actions in October 1995. Therefore, plaintiffs sufficiently pleaded affirmative acts and misrepresentations that were designed to prevent plaintiffs from discovering her alleged tortuous activity.[3]

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[3] In *Burton Twp v Speck*, 378 Mich 213, 224; 144 NW2d 347 (1966), our Supreme Court opined as follows: "While, as a general rule, concealment must be designed to mislead and must be accompanied by affirmative steps to that end . . . there is an exception as to one in a fiduciary or confidential relationship." Here, the complaint alleged that defendant's management tasks were sufficient for defendant to owe plaintiffs a fiduciary duty. Thus, there is further support for a

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Further, there was ample testimony at trial supporting the allegations in the pleadings. For example, plaintiff James Bonfiglio testified that defendant's financial reports did not accurately reflect that defendant was misappropriating plaintiffs' funds. Defendant Frederick P. Pamer also testified that the reports defendant prepared were inaccurate. He noted that, inasmuch as plaintiffs hired him and his wife to manage plaintiffs' property and prepare accurate financial reports, it was reasonable for plaintiffs to rely on the accuracy of the reports that defendant prepared. Indeed, it was these inaccurate reports that prevented plaintiffs from discovering defendant's tortuous activity. Thus, in light of the allegations in the complaint and the evidence introduced at trial, we now conclude that the trial court did not err in failing to impose a three-year statute of limitations. Therefore, we vacate our prior ruling to the contrary.

Accordingly, we remand for further proceedings consistent with both this opinion and our prior opinion. In lieu of remanding for a new trial on damages, we instead remand for a modification of the damages award consistent with our earlier rulings. In all other respects we either adhere to our prior rulings or reject the parties' contentions of error.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Peter D. O'Connell

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finding that plaintiffs' complaint was sufficient to allege fraudulent concealment under MCL 600.5855.